No. 87-448

In The

Supreme Court of the United States

October Term, 1987

JOE HESTER, Agent-in-Charge,
WESTERN DISTRICT OF TENNESSEE
ALCOHOLIC BEVERAGE COMMISSION,

Petitioner,

vs.

BEN McGEE d/b/a THE LIQUOR CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Eighth Circuit erred in determining that there was substantial evidence to support the jury verdict finding that Respondent, Ben McGee, was entitled to damages for *both* his federal claim brought pursuant to 42 U.S.C. § 1983 and his non-federal common law state claim for intentional interference with his business.

2. Is the Judgment supported by the non-Federal state tort claim separate and apart from the Federal Claim?

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RESPONDENT'S BRIEF IN OPPOSITION

—o—

Respondent Ben McGee respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

—o—

OPINIONS BELOW

The second opinion of the Court of Appeals is included in the Appendix, page A1 of the Petition. It is reported at 815 F.2d 1193 (1987). The first opinion of the Court of Appeals is included in the Appendix, pages A16-A23 and is reported at 724 F.2d 89 (1983). A Petition for Rehearing was filed and disposed of by entry of an Order on June 18, 1987, denying rehearing.

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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STATUTES INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured to an action of law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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STATEMENT OF THE CASE

Respondent Ben McGee was operating a retail liquor store in West Memphis, Arkansas, in 1979. In July of 1979, he called Petitioner Joe Hester, who was in charge of the Memphis office of the Tennessee Alcoholic Beverage Control Commission, complaining of the surveillance activities at his store. In telephone conversations with Petitioner Hester, McGee was told by Petitioner Hester that Hester would put McGee out of business. (Tr. 36). Hester also told McGee that if McGee lived in Tennessee that Hester would put him in jail. (Tr. 31). Petitioner Hester laughed at the complaints made by McGee. (Tr. 35).

McGee's store was located four hundred forty feet off U.S. Highway 70 in West Memphis, Arkansas. (Tr. 25). Agents of the Tennessee ABC were sent by Hester two to three times per week to McGee's store. (Tr. 37). The agents came in unmarked cars, with blackwall tires, small hubcaps and antennas and would stay parked three to five feet from the front door of McGee's store. (Tr. 37, 38). The agents used what appeared to be field glasses or cameras in observing customers. (Tr. 83). Agents were observed talking to McGee's customers. (Tr. 55). McGee was informed by customers that agents were outside with cameras. (Tr. 56). Agents wrote down license numbers of customers. (Tr. 38). Agent Gammon came into the store observing customers and what the customers had in their shopping carts. (Tr. 84, 89). Agent Wright directed a professional photographer to take pictures of McGee's business. (Dep. Ex. 7, pgs. 26, 28, 29). Petitioner Hester also made use of the media in his efforts against McGee including a radio talk show, television report and a newspaper article. (Tr. 40, 305, Pl. Ex. 4).

The activities complained of by McGee continued from July of 1979 until October of 1979 when McGee obtained an injunction in state Court. After obtaining the injunction, agents continued their surveillance activities. Agent Gammon testified about conducting surveillance while enjoined from doing so by stating:

> "To be honest with you, you know I wasn't over there buying a coca-cola or $2.00 worth of gas. I was trying to conduct state business without violating Arkansas law." (Tr. 40).

The presence of the agents was easily recognized by the customers without the help of McGee or his employees. (Tr. 109, 110). The presence of the agents made customers uncomfortable and deterred customers from purchasing goods from McGee. (Tr. 108, 120, 247). Customers did not like to be watched and harrassed while at McGee's store. (Tr. 97, 113, 119).

The activities carried out at Petitioner Hester's direction resulted in a dramatic loss of business. (Tr. 43, 44, 45, 84; Pl. Ex. 9 and 10).

The very day that McGee obtained an injunction in State Court Hester stated in an interview aired on the six o'clock news that Hester sincerely hoped that McGee's business had been injured because that was the intended purpose of the surveillance. (Pl. Ex. 4).

Subsequent to the injunction against Hester and other defendants being granted in state Court, Hester and the other defendants removed the action to the U.S. District Court for the Eastern District of Arkansas. McGee amended his Complaint seeking compensatory and punitive damages from Hester on *both* a federal claim (42 U.S.C. § 1983)

for deprivation of property without due process *and* a pendent state tort claim for intentional interference with his business.

The District Court granted summary judgment for Hester. McGee appealed the decision of the District Court to the Eighth Circuit Court of Appeals.

In *McGee v. Hester*, 724 F.2d 89, 8th Cir. (1983) (Pet. App. A16-A23), the Eighth Circuit found the following:

1. That the claim made by McGee was not a "insubstantial" claim contemplated by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (Pet. App. A20);

2. The objective tests of *Harlow* had been met by McGee. (Pet. App. A20);

3. That McGee had a clearly established property right of which a reasonable person would have known. (Pet. App. A20);

4. That the pendent state tort claim of intentional interference with McGee's business should be determined by the jury. (Pet. App. A22);

5. Found the facts of *Berbiglia v. Cheney*, 249 F.Supp. 258 (W.D. Mo. 1965), to be completely different from the facts presented by McGee. (Pet. App. A20);

6. That the injunctive relief sought by McGee was *moot* because the surveillance by Tennessee officials had ceased due to the fact that there was no longer a price differential existing between Arkansas and Tennessee. (Pet. App. A22);

7. McGee was not violating any Tennessee law. (Pet. App. A21).

In June of 1985 after three days of trial, the District Court submitted special interrogatories to the jury instead

of a general verdict. The District Court felt that submitting the case on special interrogatories would reduce the number of required instructions and "also give focus to the factual issues actually raised by the evidence during the course of the trial." (Pet. App. A27).

In answering the special interrogatories, the jury made the following specific findings of fact:

1. Hester told McGee that he was going to put McGee out of business;

2. Hester, in directing the ABC surveillance program, had a personal, conscious intent to harm McGee or McGee's business;

3. Hester intentionally singled out McGee and his business for surveillance activities;

4. In carrying out his surveillance activities, Hester did not believe in good faith that he was not violating McGee's constitutional rights;

5. Hester instructed his agents to employ overt and intrusive surveillance techniques to frighten away legitimate customers from McGee's business;

6. The overt manner in which the ABC's surveillance activities were conducted resulting in frightening legitimate customers away from McGee's business;

7. ABC agents visited McGee's business one to three times per week from July 1, 1979, through October 10, 1979;

8. ABC agent Gammon parked his unmarked, government vehicle directly in front of McGee's store;

9. Hester personally directed or acquiesced in the particular surveillance tactics employed by the ABC agents;

10. McGee purposefully solicited Tennessee customers to purchase liquor from his store knowing that the customers' import of the liquor into Tennessee would violate Tennessee law;

11. McGee did not offer to indemnify Tennessee customers for losses suffered as a result of transporting liquor purchased at his store into Tennessee;

12. McGee sustained losses of $7,753 as a direct and proximate result of Hester's surveillance activities;

13. Publicity surrounding the ABC's arrests and surveillance, as well as customers' first hand observance of those activities, deterred prospective customers from McGee's store;

14. McGee sustained damages through the loss of Arkansas, and other non-Tennessee customers, as well as from Tennessee residents who did and did not intend to return to Tennessee with the liquor. (Pet. App. A5-A6, A27-A33).

Because the above stated interrogatories were answered in favor of McGee, the District Court submitted the issue of punitive damages to the jury. The jury returned punitive damages in the amount of $50,000.

Consistent with the findings of the jury, the District Court entered judgment for McGee for compensatory damages in the amount of $7,573 and punitive damages in the amount of $50,000.

Hester's post trial Motion for Judgment N.O.V. or New Trial was denied upon the entry of Judgment for McGee in the sum of $1,500 compensatory damages, $50,000 punitive damages and attorney fees.

Hester appealed and the Eighth Circuit in *McGee v. Hester*, 815 F.2d 1193 (8th Cir. 1987), (Pet. App. A1-A15),

affirmed the results of the lower Court proceeding and found among other things that:

1. The evidence was sufficient to support the verdict on liability for *both* deprivation of property under Federal law and intentional interference with a business under Arkansas law. (Pet. App. A8);

2. That the evidence presented is "substantial" under either the Federal or Arkansas law concerning sufficiency of evidence. (Pet. App. A8);

3. That the jury resolved any disputed evidence in McGee's favor. (Pet. App. A8);

4. Restated its previous findings that McGee was not claiming an "insubstantial claim" contemplated by *Harlow*. (Pet. App. A5);

Hester's Petition for Rehearing was denied.

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REASONS FOR DENYING THE WRIT

There are two real issues presented by this case, sufficiency of evidence and adequate state ground for relief. The Petitioner is seeking certiorari for the limited purpose of having this Court review *de novo* the extensive record below to determine whether the Eighth Circuit Court of Appeals erred in applying the facts presented in this case to the objective tests set out by *Harlow*. McGee prevailed on his pendent state tort claim of intentional interference with his business and therefore the Judgment is based on adequate state grounds separate and apart from the Federal claim. The facts presented in this case are unique to the parties and are of interest only to the parties. The decision by the Eighth Circuit was correct.

1. The first real issue involved in this case relates to the sufficiency of evidence. The Eighth Circuit found in its first opinion that the objective tests required in *Harlow* had been met by the allegations made by McGee and further that the claim of McGee was not an "insubstantial claim" as contemplated by *Harlow*. The Eighth Circuit also found that McGee had a clearly established property right of which a reasonable person would have known. Petitioner makes reference to *Davis v. Scherer,* 468 U.S. 183 (1984). *Davis* does not change any of the reasoning or rationale contained in *Harlow*. *Davis,* in fact, relies on *Harlow*. The District Court at trial was very careful in submitting special interrogatories to the jury in lieu of a general verdict. The jury resolved all disputes of fact with its specific findings in favor of McGee. The Eighth Circuit found in its second opinion that the evidence submitted by McGee on *both* the federal and non-federal claim was substantial. In the present case, the facts have been resolved twice in favor of McGee. This Court has ruled that it will not grant certiorari to review evidence and discuss specific facts. *United States v. Johnson*, 268 U.S. 220, 227 (1925).

2. McGee prevailed on both his Federal (42 U.S.C. § 1983) claim and his non-federal state tort claim of intentional interference with his business. The Eighth Circuit specifically found that there was substantial evidence to support recovery on both theories. (Pet. App. A8) Clearly, McGee prevailed on the non-federal ground which was independent of the Federal ground and adequate to support the Judgment. In such cases, this Court has refused to grant certiorari. *Fox Film v. Muller,* 296 U.S. 207 (1935); *Wilson v. Loew's, Incorporated,* 355 U.S. 597 (1958);

Board of Supervisors of Fairfax County v. Allman, Trustee, 423 U.S. 940 (1975).

3. The particular facts presented in this case are unique to these parties. The Petitioner argues in his Petition that certiorari should be granted because of the failure to show that McGee had a "clearly established right." The Eighth Circuit specifically found that McGee had a clearly established property right. (Pet. App. A20) Petitioner also points out that the decision reached would curtail future surveillance activities by law enforcement officers and more particularly the State of Tennessee. The Eighth Circuit found in its first opinion that the injunctive relief sought was moot because the State of Tennessee had discontinued surveillance activities because the price differential between Arkansas and Tennessee no longer existed. (Pet. App. A22) Further, any law enforcement officer desiring to carry on surveillance activities would not call the party to be surveilled and tell that party that the officer was going to put him out of business. No law enforcement officer conducting legitimate surveillance activities would conduct the activities in the manner carried out by Petitioner Joe Hester. To carry out surveillance activities as conducted by Joe Hester would defeat the purpose of surveillance.

4. The decision reached is a correct one. McGee was operating a lawful business in the State of Arkansas. The Eighth Circuit specifically found that he was violating no law of the State of Tennessee. No "public official" should be allowed to hide behind his position and escape responsibility for activities such as those carried out by the Petitioner.

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CONCLUSION

Therefore, as the Petition for Writ of Certiorari fails to raise arguments which meet the standards for granting certiorari, it must be denied. Fees and costs should be assessed for opposing the Petition.

Respectfully submitted,

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